Supreme Court, U.S.
FILED

MAR 29 2001

OFFICE OF THE CLERK

No. 00-1403

In The

Supreme Court of the United States

BETTY JEAN GURLEY,

Petitioner,

v.

GEORGE E. MILLS, JR.,
CHAPTER 7 TRUSTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether one who designates his wife as his nominee to hold bare legal title to his assets while retaining plenary control over and unfettered access to all of the assets has consummated a transfer which triggers the commencement of the limitations period for voiding a fraudulent transfer?

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, George E. Mills, Jr., Chapter 7 Trustee, respectfully opposes the petition filed by Betty Jean Gurley seeking certiorari review of the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF THE CASE

Petitioner's lengthy exposition of the facts underlying the petition serves to underscore the obvious – the decisions below were fundamentally fact-driven. Equally as important, Petitioner's recitation of facts is not consistent with the findings below but rather reflects Mr. Gurley's testimony in the trial proceedings. The Bankruptcy Court made a seminal finding that Mr. Gurley lacked credibility.

> The facts reveal a pattern of numerous omissions which certainly warrants the inference of reckless and cavalier disregard for the truth. . . . The Debtor attempted to take advantage of a system available to benefit the honest, but unfortunate debtor. The Debtor's actions and attitude reflect disrespect and disregard for the Court.

App. D at 24a[1]. Although this finding formed the basis for denying Mr. Gurley's discharge in bankruptcy, it also stands as the trial court's evaluation of his credibility on

[1] All references are to the Appendix filed with the Petition for a Writ of Certiorari herein.

all the matters to which he testified. Thus, many of Petitioner's asserted "facts" that are derived from Mr. Gurley's testimony were specifically rejected by the Bankruptcy Court.

Petitioner states that the Bankruptcy Court found that the transfers at issue occurred *"prior to Betty Gurley's June 1990 dismissal from the CERCLA action* and after [William Gurley began] experiencing health problems." Petition at 2 (emphasis in the original). The Bankruptcy Court actually found that "[t]he Debtor began to transfer his assets at a time when the United States' multimillion dollar suit against him in the Edmonson site case seemed to be succeeding and when it appeared that the case against Mrs. Gurley was going to be dismissed." App. D at 24a. Moreover, the statement that the transfers occurred after Mr. Gurley experienced health problems is found in the trial court's recitation of Mr. Gurley's testimony. App. D at 24a. The Bankruptcy Court did not find that Mr. Gurley's transfers were truly health motivated[2].

Petitioner also states that "the courts have not acknowledged that William Gurley lost any right to sign checks or withdraw funds from accounts transferred to Betty Gurley in 1989." Petition at 3, n.1. In fact, the courts noted the insignificance of that "fact" by noting that all the assets were under the actual control of Forrest Bedford Heath, Mr. Gurley's trusted employee, through whom Mr. Gurley maintained complete access to and

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[2] In fact, the evidence at trial showed that Mr. Gurley first experienced the health problem to which he attributed his need for estate planning several months after the execution of the ineffective deed of gift of Moltan to Mrs. Gurley.

absolute control over all assets. App. B at 5a; App. D at 17a, 25a.

The Bankruptcy Court found that Mr. Gurley continued to exercise *de facto* control and dominion of all assets, regardless of how titled, and that, in contrast, Mrs. Gurley exhibited no indication of ownership of the assets. The Bankruptcy Court determined that in holding bare legal title to the assets, Mrs. Gurley was no more than Mr. Gurley's nominee as Mr. Gurley "exercises **plenary control** for his own benefit over all property and funds transferred." App. D at 36a-38a (emphasis added).

Moreover, the Bankruptcy Court found that Mr. Gurley had never made a gift of Moltan Company, the sole proprietorship he owned and operated, to Mrs. Gurley. App. D at 29a. This finding is purely one of fact and turns, in large part, on the Bankruptcy Court's evaluation of the credibility of the witnesses concerning that alleged gift. App. 18a-19a; 28a-29a.

Thus, the Bankruptcy Court found, as a mixed issue of fact and law, that no actual transfer of assets occurred. App. D at 37a-38a. Each reviewing court upheld that decision as supported by competent substantial evidence and by controlling law. App. A at 2a-3a; App. B at 8a-9a.

At every stage of this proceeding, Petitioner has contended that the statute of limitations for fraudulent transfers bars the Trustee's claim for turnover of Mr. Gurley's interest in these assets to his bankruptcy estate. The statute of limitations argument requires a finding of fact that a valid and effective transfer has been made. The Bankruptcy Court expressly rejected any such finding and that decision was upheld by both the United States

District Court and the Eleventh Circuit Court of Appeals. The Eleventh Circuit succinctly summed up the application of law to the facts of this case: "The statute of limitations applies where a party is seeking to set aside fraudulent transfers not, as here, where there was no valid transfer in the first place." App. A at 3a.

REASONS FOR DENYING THE PETITION

The ruling of the Bankruptcy Court, affirmed by the United States District Court and the Eleventh Circuit Court of Appeals, turned on issues of fact and the application of Florida law. *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 918, 59 L. Ed. 2d 136 (1979). App. 36a; 8a; 2a. As stated in Rule 10 of the Rules of the Supreme Court of the United States, *Considerations Governing Review on Certiorari*, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Petitioner attempts to raise a question of federal law: whether fraudulently transferred assets are property of the estate at the commencement of the bankruptcy. Petition at 8. Having thus framed the issue, Petitioner contends that the decision of the Eleventh Circuit below "broadens a conflict among the courts of appeal." Petition at 9. The premise and the issue derived therefrom flagrantly misrepresent the decision of the Eleventh Circuit and raise issues not decided by any court below.

A. The Eleventh Circuit Ruled that No Effective Transfer Had Occurred; It Did Not Determine Whether Fraudulently Transferred Assets are Property of the Estate at the Inception of the Bankruptcy.

Petitioner contends that the Eleventh Circuit's decision in the case below aligns the circuit with those which hold that fraudulently transferred property is property of the estate before the trustee recovers it, citing *American National Bank v. Mortgage America Corp. (In re Mortgage America Corp.)*, 714 F.2d 1266, 1275 (5th Cir. 1983). Petitioner urges this Court to reverse the Eleventh Circuit and to adopt the decision in *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125 (2d Cir. 1992), as the controlling interpretation of 11 U.S.C. § 541. However, the Eleventh Circuit's decision below does not turn on this issue, and for good reason. The Petitioner did not raise it in any prior proceeding on this matter[3]. Not surprisingly, therefore, none of the courts addressed the issue in the analysis of the case. *See* App. A at 1a-3a; App. B at 4a-11a; App. D at 15a-39a.

The courts below never needed to address the issue, because on the facts before them, the issue never ripened. The trial court found, and each appellate court affirmed, that **no effective transfer had occurred**. Thus, the question of whether fraudulently transferred assets are part of

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[3] This alone is sufficient grounds to deny the petition for writ of certiorari. The Court will not ordinarily decide issues of law not raised in the lower tribunals. *See e.g. Glover v. United States*, ___ U.S. ___ 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998); *Taylor v. Frieland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992).

the bankruptcy estate at its inception is not at issue on these facts.

The Eleventh Circuit's decision expressly turned on the facts of record:

> The debtor was aware that a judgment against him (and not his wife) was imminent. He precipitously undertook to transfer certain assets and real property to his wife, the appellant, and to purchase other assets in her name. **However, he continued to exercise dominion and control over all the property and assets now held in the appellant's name, including certain assets he purportedly had made as a gift to her. Moreover, he continued to benefit from the proceeds of all the properties and assets held in the appellant's name. Although the appellant signed her name to several documents, it was done at debtor's direction and did not evidence control of decision making on her part. Indeed, the debtor held himself out to the public as the owner of certain properties long after he had purportedly transferred them to the appellant.**

App. A at 3a (emphasis added). The Eleventh Circuit was not concerned in the least with whether **fraudulently transferred** assets were part of the estate prior to recovery by the trustee. Rather, the sole issue before the Eleventh Circuit (as it had been the sole issue before the District Court) was whether **any** effective transfer had **ever** taken place. The Circuit Court found on the factual record before it that, as a matter of Florida law, no transfer had occurred.

Petitioner contends that a state may not "circumvent this prohibition [against including fraudulently transferred property in the bankruptcy estate at its inception] by defining a debtor's interest in fraudulently transferred property as an "equitable interest in property . . . ."[4] Petitioner begs the question when she ignores the plain distinction the courts drew between "fraudulent transfer" and "no transfer." Where no transfer has occurred, there can be no fraudulent transfer.

Reality must control over manipulation of legal principles. While Petitioner persists in referring to the assets as fraudulently transferred, the courts below uniformly found that Mr. Gurley had divested himself of nothing but naked legal title. His wife did not hold anything in her own right or exercise any ownership interest or control. She was merely Mr. Gurley's nominee – his puppet – through whom he maintained precisely the same ownership authority and control he had always enjoyed in his assets. The courts below held that one who divests himself of **nothing**, one who merely changes the label on his property, brings all he has into the bankruptcy estate once he seeks the protection of bankruptcy laws. The reality before the Bankruptcy Court was that Mr. Gurley

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[4] State law attributing ownership to the party who exercises plenary authority and control over the asset is not, as Petitioner describes it, "sleight of hand." Petition at 7. Rather, the law serves to frustrate Mr. Gurley's own attempt at sleight of hand. The law will not permit him to make his assets disappear for purposes of bankruptcy while allowing him to retain his power and control over them for purposes of his own enjoyment, benefit, management and operation.

continued to exercise virtual and plenary ownership over all the assets he purported to have transferred to his wife.

The question this case actually presents (a question Petitioner does not want to raise because the issue has uniformly been decided against her) is whether her husband could use her as a pawn to protect his assets from bankruptcy while he retained complete, unfettered control over those same assets. The courts below have applied simple logic, equity, and the clear precepts of Florida law to reach the correct determination: One who retains the use, benefit, dominion and control over an asset is its "owner" regardless of the form in which legal title is held. *See Towerhouse Condominium, Inc. v. Millman*, 475 So. 2d 674 (Fla. 1985); *Metropolitan Dade County v. Brothers of Good Shepherd, Inc.*, 714 So. 2d 573 (Fla. 3d DCA 1998); *Leon County Educational Facilities Authority v. Hartsfield*, 698 So. 2d 526 (Fla. 1997); *Walton v. Tomax Corp.*, 632 So. 2d 178 (Fla. 5th DCA 1994); *Williams v. Department of Health and Rehabilitative Services*, 522 So. 2d 951 (Fla. 1st DCA 1988); *Bove v. PBW Stock Exchange, Inc.*, 382 So. 2d 450 (Fla. 2d DCA 1980).

Federal law also reaches this conclusion when specific findings of fact inexorably compel it. *See In re LiButti*, 107 F.3d 110 (2d Cir. 1997); *Towe Antique Ford Foundation v. IRS*, 999 F.2d 1387 (9th Cir. 1993); *In re Charnock (United States v. Charnock)*, 97 B.R. 619 (Bankr. M.D. Fla. 1989). In short, both federal and Florida courts refuse to be duped by appointment of a nominee into believing that the individual controlling the nominee has divested himself of ownership interest in the property.

As a matter of law, William Gurley's bankruptcy estate included whatever he owned, regardless of the "label" he had attached to it. Inasmuch as he had relinquished no ownership control or authority to his wife and had denied himself no benefit from or authority over the assets, the assets were rightly part of his estate when he fraudulently sought bankruptcy protection.

There is no conflict between or among the circuits on this issue.

B. The Question Presented by the Case Before the Court is Neither Important nor Recurring.

Petitioner contends that the question of whether fraudulently transferred assets are property of the bankruptcy estate at the commencement of the bankruptcy is an important and recurring issue. Respondent expresses no opinion on that contention because it is irrelevant to certiorari review of this case[5]. Rather, Respondent points out that the fact-specific determination that no effective transfer had occurred cannot be a recurring issue for purposes of a grant of certiorari review. Fact-specific cases, by their very nature, are not "bright-line" cases establishing general rules of law.

There is no conflict among the circuits over the issue which was dispositive in this case: Whether one who retains all ownership interest in his assets other than bare

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[5] Nonetheless, if Petitioner is correct, the conflict will certainly be raised before this Court in a case in which the issue was material to the holding below and passed upon by the appellate court. This is **not** that case.

legal title has "transferred" assets as contemplated in 28 U.S.C. § 3301. As noted above, federal courts have recognized that on specific facts, ownership does not follow legal title. Nominees are not owners.

The question Petitioner raises is not important to the resolution of this case. Even assuming this Court were to determine that Petitioner's interpretation of 11 U.S.C. § 541 is correct, the outcome of this case would not be altered because the controlling finding of fact herein was that no effective transfer had occurred.

CONCLUSION

WHEREFORE, Respondent George E. Mills, Jr., Chapter 7 Trustee, respectfully requests this honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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